

---

1-1-2009

# Pay or Play: On Specific Performance and Sports Franchise Leases

Will Hendrick

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

---

## Recommended Citation

Will Hendrick, *Pay or Play: On Specific Performance and Sports Franchise Leases*, 87 N.C. L. REV. 504 (2009).

Available at: <http://scholarship.law.unc.edu/nclr/vol87/iss2/4>

This Comments is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

## Pay or Play?: On Specific Performance and Sports Franchise Leases\*

INTRODUCTION .....	504
I. SPECIFIC PERFORMANCE: THE EQUITABLE EXCEPTION TO THE RULE .....	507
II. WHEN SPECIFIC PERFORMANCE IS GRANTED.....	510
A. <i>Impossibility of Valuation</i> .....	511
B. <i>Inadequacy of Damages</i> .....	511
1. Contracts for the Sale of Land.....	512
2. Goods of Sentimental Value .....	513
3. Goods that are Unavailable on the Market .....	514
III. OVERCOMING THE RELUCTANCE TO AWARD SPECIFIC PERFORMANCE IN LEASE CONTRACTS.....	515
IV. WHAT'S IT WORTH?: THE DIFFICULTY OF ECONOMIC VALUATION OF FRANCHISE PRESENCE .....	518
A. <i>Increase in Taxable Spending and the Number of Taxable Residents</i> .....	519
B. <i>Urban Renewal</i> .....	522
C. <i>Opportunity Costs</i> .....	523
D. <i>Is There Really an Economic Benefit?</i> .....	523
V. WHAT'S IT TO YOU?: THE NONPECUNIARY BENEFIT OF THE BARGAIN.....	525
A. <i>Social Identity</i> .....	525
B. <i>Sentimental Attachment</i> .....	528
C. <i>Inability to Cover on the Market Undermines Damage Remedy</i> .....	529
CONCLUSION .....	533

### INTRODUCTION

On a rainy night in 1984, while throngs of adoring Baltimore Colts fans were fast asleep, their dreams were taken from them, the object of their affection boxed, loaded onto Mayflower trucks, and moved to the city of Indianapolis.<sup>1</sup> With the mobilization of this covert caravan, Colts owner Robert Irsay made good on his threat to

---

\* Copyright © 2009 by Will Hendrick.

1. Kimberly S. Schimmel et al., *Professional Team Sport and the American City: Urban Politics and Franchise Relocations*, in *SPORT IN SOCIAL DEVELOPMENT* 211, 231 (Alan G. Ingham & John W. Loy eds., 1993).

leave Baltimore and, in doing so, further strained the relationship between professional sports franchises and their host cities.<sup>2</sup> In the years since this relocation, the power of the franchise owner has continued to grow. Cities now find themselves held hostage by team owners threatening to do the unthinkable—move their beloved franchise.<sup>3</sup> Most often, this threat is made to garner support for new building initiatives, with owners hinting or expressly stating that, without a new or renovated stadium, they will be forced to leave for a more suitable venue.<sup>4</sup> Although these threats of premature departure cannot be characterized as anticipatory breaches of contract,<sup>5</sup> team owners are staring down city councils across the nation and demanding that certain conditions be met. If these conditions are not met, team owners make good on their threats to break the contractual obligations that currently bind them to that location.<sup>6</sup>

The most obvious of these contractual obligations is the team's lease agreement to play home games in its current stadium.<sup>7</sup> For

---

2. The Colts were by no means the first franchise to relocate, but their move "was something new and frightening: a team leaving its home of three decades not for lack of support (the Colts had continued to attract large crowds in its last years in Baltimore), but solely for the lure of greater profits." JOANNA CAGAN & NEIL DEMAUSE, *FIELD OF SCHEMES* 3 (1998).

3. See Frank A. Mayer, III, *Stadium Financing: Where We Are, How We Got Here, and Where We Are Going*, 12 VILL. SPORTS & ENT. L.J. 195, 202–06 (2005) (noting that, as the "power of the team owner to arbitrarily move the team to a new location has grown over time," municipal decision makers are placed under increased pressure to meet owner demands). For example, between 1950 and 1996, there were forty-three instances of a major league team relocating to a new metropolitan area. See MICHAEL N. DANIELSON, *HOME TEAM: PROFESSIONAL SPORTS AND THE AMERICAN METROPOLIS* 140 (1997).

4. DANIELSON, *supra* note 3, at 233 ("The threat to move is a key element in bargaining over stadiums and leases, and enough teams have moved to make the threat real."); MARK S. ROSENTRAUB, *MAJOR LEAGUE LOSERS: THE REAL COST OF SPORTS AND WHO'S PAYING FOR IT* 7 (rev. ed. 1999) (exposing the tendency of a team owner seeking public subsidies to claim "that he or she will have to leave the community, as unpleasant and repulsive as that thought is, if a satisfactory facility is not built that has the potential to increase revenues").

5. *First Nat'l Bank & Trust Co. of Evanston v. First Nat'l Bank of Skokie*, 533 N.E.2d 8, 12 (Ill. App. Ct. 1988) ("In order to justify the adverse party in treating a renunciation as an anticipatory breach of a contract[,] there must be a definite and unequivocal manifestation of intention that the party will not render the promised performance when the time fixed for it in the contract arrives.") (quoting *Stonecipher v. Pillatsch*, 332 N.E.2d 151, 153 (Ill. App. Ct. 1975)). However, when threatened breach is contingent on the independent choice of the adverse party, the manifestation of intention to breach cannot properly be characterized as definite.

6. See CAGAN & DEMAUSE, *supra* note 2, at 28.

7. At one point in history, franchise owners were more likely to finance and control ownership of the stadium. DANIELSON, *supra* note 3, at 223 ("Prior to the Great Depression, big league playing facilities were private enterprises. Entrepreneurs acquired land, built ballparks and arenas, and operated them."). But the status quo today is for the

instance, the City of Seattle recently found itself embroiled in litigation aimed at enforcing its contract with the local franchise of the National Basketball Association (“NBA”), the Seattle Supersonics.<sup>8</sup> Central to the City’s case<sup>9</sup> was a clause in the contract maintaining that the obligations of the parties were unique and that the contract “may be specifically enforced by either party.”<sup>10</sup> Inspired by this contractual attempt to prohibit whimsical franchise relocation, this Comment analyzes the viability of specific performance as a remedy in contractual actions based on lease agreements formed between professional sports franchises and their host cities.

To adequately express the formidability of the obstacles facing the city of Seattle and other municipalities in such actions, Part I addresses the traditional reluctance of courts to award specific performance as a remedy in contract disputes. Additional background law is provided in Part II, which highlights the areas of jurisprudence in which the remedy is more readily available.<sup>11</sup> Part III considers specific performance as applied to lease contracts and differentiates sports franchise leases from typical rental agreements. Through analogy to areas of law in which specific performance is more readily available, the remainder of this Comment is devoted to the argument that, given the unique nature of the sports franchise lease, a city should be entitled to relief that cannot be captured solely through damages. In constructing this argument, Part IV focuses on

---

franchise to play games in a publicly owned stadium. Dennis Coates & Brad R. Humphreys, *The Stadium Gambit and Local Economic Development*, 23 REGULATION 15, 16, (2000), available at <http://www.cato.org/pubs/regulation/regv23n2/coates.pdf>. However, “[i]t appears that the future trend for sports facility construction is moving to a more private and less public support.” Ralph C. Anzivino, *Reorganization of the Professional Sports Franchise*, 12 MARQ. SPORTS L. REV. 9, 37 (2001). Until this pendulum swing is complete, public contracts with sports franchises remain an issue for debate nationwide.

8. *City of Seattle v. Prof’l Basketball Club, LLC*, No. C07-1620MJP (W.D. Wash. July 7, 2008), available at <http://docs.justia.com/cases/federal/district-courts/washington/wawdce/2:2007cv01620/146857/143/> (ordering the case dismissed because the parties agree to a settlement).

9. *City of Seattle v. Prof’l Basketball Club, LLC*, No. C07-1620RSM, 2007 WL 3217556, at \*3 (W.D. Wash. Oct. 29, 2007).

10. Premises Use and Occupancy Agreement between the City of Seattle and SSI Sports, Inc. 59 (Mar. 2, 1994) (on file with the North Carolina Law Review).

11. The analysis of specific performance to follow is not intended to be a thorough treatment of the doctrine, but rather a brief overview of equitable concepts that are useful in constructing an argument from analogy for the specific performance of lease contracts between sports franchises and cities. For a justification of the specific performance remedy as a whole, see generally Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 271 (1979) (“[T]he remedy of specific performance should be as routinely available as the damages remedy.”).

the difficulty of economic valuation of the benefit conferred upon a city by the tenancy of a sports team. After concluding that this benefit is not captured entirely in terms of monetary rewards to a city, Part V concentrates on the aspects of the tenancy that cannot be replaced with a damages award, such as the provision of community identity and the establishment of sentimental attachment, while furthering the argument for specific performance by emphasizing the inability of the team to cover on the market. This Comment concludes that, in order to fulfill the goals of contract law, courts should specifically enforce lease contracts between sports teams and their municipal hosts.

#### I. SPECIFIC PERFORMANCE: THE EQUITABLE EXCEPTION TO THE RULE

Contract law in the United States exhibits a decided preference for awarding damages rather than specific performance in actions for breach of contract.<sup>12</sup> Indeed, monetary damages are the only remedy that is always available to the victim of breach.<sup>13</sup> As Farnsworth succinctly stated, “[o]ur system of contract remedies is not directed at *compulsion of promisors to prevent breach*; it is aimed, instead, at *relief to promisees to redress breach*.”<sup>14</sup> By awarding sufficient monetary damages, the courts force the breaching party to provide a form of substitutional relief intended to place the promisee in the same position that he would have been in had the promise been performed.<sup>15</sup>

---

12. *Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33, 39–40 (8th Cir. 1975) (“It is axiomatic that specific performance will not be ordered when the party claiming breach of contract has an adequate remedy at law.”); *see also* *Miller v. LeSea Broadcasting, Inc.*, 87 F.3d 224, 230 (7th Cir. 1996) (“The normal remedy for breach of contract is an award of damages.”); *USA Network v. Jones Intercable, Inc.*, 704 F. Supp. 488, 491 (S.D.N.Y. 1989) (“In the contract setting, injunctive relief, both interlocutory and final, is the exception and not the rule.”). This can be contrasted with the preference for specific performance in civil law systems. *See* Ronald J. Scalise Jr., *Why No “Efficient Breach” in Civil Law?: A Comparative Assessment of the Doctrine of Efficient Breach of Contract*, 55 AM. J. COMP. L. 721, 734 (2007) (“For historical reasons, specific performance in civil law jurisdictions is not disfavored as in common law jurisdictions and, in fact, is often characterized as the preferred remedy for breaches of contract.”).

13. OLIVER W. HOLMES, JR., *THE COMMON LAW* 301 (1881) (“The only universal consequence of a legally binding promise is[] that the law makes the promisor pay damages if the promised event does not come to pass.”).

14. E. ALLEN FARNSWORTH, *CONTRACTS* § 12.1 (4th ed. 2004) (emphasis in original).

15. *See, e.g.,* *Pingley v. Brunson*, 252 S.E.2d 560, 561 (S.C. 1979) (“[I]f the subject matter of a contract is such that its substantial equivalent is readily obtainable from others

However, the belief that damages will be sufficient to confer upon the promisee the benefit of the bargain rests on the dual assumptions that the benefit can be quantified and that the promisee can secure similar performance from the open market.<sup>16</sup> Unfortunately, in some situations, these assumptions fail to hold true, and the promisee cannot be made whole by an award of damages. In recognition of the fallibility of these assumptions, the English Courts of Equity developed the alternative remedy of specific performance.<sup>17</sup> Specific performance demands that the breaching party actually perform his contractual obligations.<sup>18</sup>

For a number of reasons, courts are typically reluctant to exercise their powers of equity in this manner. Often, even if specific performance is warranted, courts will avoid this remedy because of the attendant "difficulty of supervision."<sup>19</sup> Specifically, the necessary supervision may be sufficiently difficult to rule against specific performance when oversight would be required for a long period of time.<sup>20</sup> This difficulty is often magnified when the court is asked to watch over the performance of specialized contracts involving technical knowledge or expertise, as well as those involving "extensive and varied tasks and talents."<sup>21</sup> Even when no expertise is required, some courts are reluctant to award specific performance when the contract in dispute is unusually complex and extensive supervision would be required to assure completion of all of its terms,<sup>22</sup> "unless the difficulties of supervision outweigh the importance of specific performance to the plaintiff."<sup>23</sup> Increasingly,

---

rather than defendant in an exchange for a money payment, this factor will be sufficient to deny specific performance.").

16. Of course, if the performance expected is the payment of money, then the sufficiency of damages will not require an appeal to market forces, as the remedy and the performance are one and the same.

17. See JOSEPH M. PERILLO, *CALAMARI AND PERILLO ON CONTRACTS* 633 (5th ed. 2003).

18. FARNSWORTH, *supra* note 14, at § 12.5 ("By ordering the promisor to render the promised performance, the court attempts to produce, as nearly as is practicable, the same effect as if the contract had been performed.").

19. Schwartz, *supra* note 11, at 293.

20. Risk v. Thompson, 147 N.E.2d 540, 545 (Ind. 1958).

21. Madison Plaza, Inc. v. Shapira Corp., 387 N.E.2d 483, 486 (Ind. Ct. App. 1979).

22. City Stores Co. v. Ammerman, 266 F. Supp 766, 776 (D.D.C. 1967). However, some critics of this difficult principle argue that courts have "overdone the fear of enforcement difficulties." DAN B. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* §§ 2.5, 12.2 (1973) ("Most persons ordered to perform will do so, and those that do not can certainly be subjected to equity's awesome contempt powers if that is in fact necessary.").

23. Ammerman, 266 F. Supp. at 776.

however, the mere necessity of supervision will not prevent an award of specific performance.

Critics also argue against specific performance because it is less efficient than the damage remedy. They maintain that if the presumed remedy is damages, then when the seller knows that the buyer's losses are less than the increase in the market, he can breach, pay damages, and capture the market increase.<sup>24</sup> An award of specific performance would hinder the ability of the breaching party to take advantage of these market factors. Another argument from an efficiency standpoint is that specific performance increases post-breach negotiation costs.<sup>25</sup> "[I]f buyers can threaten specific performance and thereby seek to capture some of the seller's profits from the breach, sellers will bargain hard to keep as much of the profits as they can."<sup>26</sup>

Still, perhaps the most powerful argument against the remedy of specific performance is grounded in liberty and personal autonomy. Respect for the freedom of the breaching party has led to a presumption against specific performance in contracts for personal services.<sup>27</sup> This presumption is even stronger when "the performance of the services contracted for would be continuous over a long period of time."<sup>28</sup> The crux of the argument is that forcing someone to perform a personal service contract "would be but a mitigated form of slavery, in which the party would have lost the right to dispose of himself as a free agent, and be . . . subject to the control of another."<sup>29</sup> Our political system prefers not to interfere in the lives of its citizenry in such a manner as to inhibit personal liberty, so forced contract performance is avoided whenever possible.<sup>30</sup> Furthermore, "[s]pecific

---

24. For more on this theory, called "efficient breach," see Robert Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 284-86 (1970).

25. Schwartz, *supra* note 11, at 284-87.

26. *Id.* at 285-86.

27. See *Pingley v. Brunson*, 252 S.E.2d 560, 561 (S.C. 1979); see also *Nassau Sports v. Peters*, 352 F. Supp 870, 875 (E.D.N.Y. 1972) (recognizing the presumption against specific performance of a personal services contract and distinguishing the availability of injunctive relief to prevent violation of negative covenants therein). However, this presumption can be rebutted "under limited circumstances" by a showing that services have a "unique and peculiar value." *Pingley*, 252 S.E.2d at 561.

28. *Id.*

29. *Ford v. Jermon*, 6 Phila. 6 (Dist. Ct. 1865).

30. While founded on personal autonomy, there are other justifications for this prohibition. For example, the difficulty of supervision and enforcement is magnified in cases of personal service because of the inability of the courts to compel a certain quality of performance. DOBBS, *supra* note 22, § 2.5 ("How do you make an opera singer sing her best? You don't.").

performance is particularly undesirable and impractical where it would force essentially hostile parties into an ongoing, active business relationship.”<sup>31</sup>

Despite all of these objections, a few areas of law have emerged in which specific performance is more generally accepted and even sometimes presumed. The Section below analyzes the areas of law in which specific performance is most often awarded. This is done to extract common characteristics of successful claims that will be relevant to the discussion in the subsequent Part.

## II. WHEN SPECIFIC PERFORMANCE IS GRANTED

Specific performance as an equitable remedy is always awarded at the judge’s discretion on a case-by-case basis,<sup>32</sup> and, as such, it can be difficult to distill a set of criteria by which the validity of a claim for specific performance can be measured. Yet, while the case law defies judicial checklists or convenient three-step inquiries, two distinct theories in support of specific performance have proven repeatedly persuasive.<sup>33</sup> The first potential foundation for an award of specific performance is the inability to accurately assess the monetary value of the promisor’s performance, as such calculation is a logical prerequisite to awarding damages. This justification for specific performance should be distinguished from the argument that money of any amount would be insufficient to remedy the harm done to the victim because of the irreplaceable nature of the good sold.<sup>34</sup> The former is to argue that damages are impracticable, the latter that they are inadequate.<sup>35</sup>

---

31. *USA Network v. Jones Intercable, Inc.*, 704 F. Supp. 488, 491 (S.D.N.Y. 1989).

32. *See Haffner v. Dobrinski*, 215 U.S. 446, 450 (1910) (“[T]he doctrine is well settled that specific performance is never demandable as a matter of absolute right, but [it is] one which rests entirely in judicial discretion.”). *But cf. Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33, 39 (8th Cir. 1975) (“[W]hen certain equitable rules have been met and the contract is fair and plain ‘specific performance goes as a matter of right.’” (citations omitted)).

33. Other possible arguments in support of specific performance exist, such as a claim that money damages could not be collected once awarded or that full relief would require multiple suits for damages. *See* 12-63 CORBIN ON CONTRACTS § 1142 (2005). This Comment focuses on the two arguments for specific performance most applicable to contractual disputes regarding sports franchise leases.

34. 4 JOHN NORTON POMEROY, POMEROY’S EQUITY JURISPRUDENCE § 1401 (5th ed. 1941).

35. *Id.*



*A. Impossibility of Valuation*

In order to ensure that the promisee receives the full benefit of the bargain, courts must first undertake the often difficult task of identifying the benefit conferred. Surrendering to this difficulty, courts have awarded specific performance where it was too complicated to accurately assess the harm to the victim in terms of money damages.<sup>36</sup> Such complication might arise because of either the ambiguity or the complexity of the terms of the contract. This departure from the norm of awarding damages is not necessarily as drastic as it may seem. After all, courts need not abandon their traditional view that money serves as appropriate substitutional relief if the only reason for not awarding damages is that there is no way of determining what amount would be necessary.

With the increasing sophistication of economic modeling and the commodification of countless aspects of our society, it is becoming more difficult to imagine benefits that cannot be quantified in dollars. Still, to assume that every benefit is quantifiable is to ignore both the subjectivity of value and the complex nature of many contractual agreements.

*B. Inadequacy of Damages*

Because the remedy of damages envisions relief through substitution, specific performance claims are more successful when simple replacement would prove inadequate to confer on the promisee the benefit of the bargain. Damages are sometimes inadequate because of the unique subjective connection between the promisee and the goods or promises conveyed. In other instances, the inadequacy stems from a more objective realization of the unavailability of the goods on the market.<sup>37</sup>

---

36. See DONALD HARRIS ET AL., REMEDIES IN CONTRACT & TORT 168 (William Twining & Christopher McCrudden eds., Butterworths 2002) (1988) (noting that the more difficult it is to assess the value of the benefit of the contract, the more willing a court will be to grant specific performance). Traditionally, courts have characterized the inability to calculate damages as a mere factor supporting irreparable harm determinations. *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1263 (10th Cir. 2004) (recognizing inability to calculate damages as a factor supporting irreparable harm determinations); see also *Autoskill Inc. v. Nat'l Educ. Support Sys., Inc.*, 994 F.2d 1476, 1498 (10th Cir. 1993) (upholding a finding of irreparable harm in part due to the difficulty of calculating damages).

37. DOBBS, *supra* note 22, § 3.9 (explaining that damages as a legal remedy are usually inadequate when the breach denies the non-breaching party of something the market does not offer).

### 1. Contracts for the Sale of Land

Specific performance is perhaps most commonly awarded in contracts for the sale of land, because both types of inadequacy counsel against a damages remedy. As one court pointed out, “[i]t is almost a matter of course that a court of equity will enforce specific performance of contracts concerning land, for all land is assumed to have a peculiar value to those who contract as to it, so that damages for breach of the contract [are] not an adequate remedy.”<sup>38</sup> Yet, the “peculiar value” of land is not necessarily intuitive. One justification for the fact that contracts for the sale of land are typically enforced through specific performance could be the presumption that no two parcels of land are physically identical.<sup>39</sup> This focus on unique geographical characteristics enables courts to pronounce the unavailability of substitutional relief as a matter of objective fact. The underlying understanding is that the promisee could not take a damage award and buy the same item on the open market, because “performance cannot be duplicated by another.”<sup>40</sup> Also, “the value of land is to some extent speculative[,]”<sup>41</sup> so there is a distinct possibility of over- or under-valuation if damages are awarded.<sup>42</sup>

Rather than focus on the real nature of the land, some courts have awarded specific performance because damage awards are seen as an incomplete remedy due to the subjective value of the land to the buyer.<sup>43</sup> In this manner, courts can justify differentiation between real estate sold for commercial purposes and that sold for residential purposes, claiming that the loss of the former is an economic loss that is entirely compensable in damages.<sup>44</sup>

Yet, the courts have been somewhat ambiguous in defining the subjective “special value” of land. One possible way to characterize this value of land is through the contribution of land ownership to

---

38. *F.B. Norman Co. v. E.I. Du Pont De Nemours & Co.*, 108 A. 743, 746 (Del. Ch. 1920).

39. *DOBBS*, *supra* note 22, § 12.2.

40. *Id.*

41. *RESTATEMENT (SECOND) OF CONTRACTS* § 360 cmt. e (1981). Thus, while the inadequacy of damages to remedy the harm is the predominant claim made in support of specific performance of contracts for land, in some instances, courts may find the value impossible to accurately quantify for purposes of a damages award.

42. Conversely, when real estate is not unique, specific performance will not be granted. *See, e.g.*, *Centex Homes Corp. v. Boag*, 320 A.2d 194, 198 (N.J. Super. Ct. Ch. Div. 1974) (denying specific performance in a contract for the sale of a condominium that was “one of hundreds of virtually identical units being offered by a developer for sale to the public”).

43. *See, e.g.*, *Adderley v. Dixon*, (1824) 57 Eng. Rep. 239.

44. *Geneva Ltd. Partners v. Kemp*, 779 F. Supp. 1237, 1241 (N.D. Cal. 1990).

personal identity. Ever since this nation was founded, land ownership has been fundamental in rights of civic participation.<sup>45</sup> To own land was thus to stake a claim to community inclusion that could not be achieved otherwise. Accordingly, concurrent with the establishment of equity jurisdiction was the recognition that the social consequences of violating a promise to transfer an interest in land rendered damages an entirely inadequate remedy.<sup>46</sup>

## 2. Goods of Sentimental Value

The sentimental value of goods has also been sufficient to justify an award of specific performance.<sup>47</sup> Unlike real property, where the uniqueness arguably stems from the value of land qua land, a chattel is not unique, and the promisee must argue that the particular item contracted for sale is unique. One way to do so is to appeal to the emotive history of a particular object. For instance, one of the earliest cases to address sentimental uniqueness came from English common law and involved possession of a unique horn given to the plaintiff's "ancestors in ancient time."<sup>48</sup> Sentimental attachment need not, however, be based on the nature of the good itself and can instead be proven by evidence of the complainant's involvement with that good.<sup>49</sup>

The primary justification for specific performance in these cases is the impossibility of compensation through monetary relief because of the lack of fungible goods available on the market.<sup>50</sup> The

---

45. "For people of [the colonial] era, only property ownership could assure the capacity of the voter to decide questions of community governance. Property supplied independence; those without property were presumed to be economically dependent on and subservient to others." Richard Briffault, *The Contested Right to Vote*, 100 MICH. L. REV. 1506, 1509 (2002).

46. *Centex*, 320 A.2d at 196 ("[T]he social order of that era led to the conclusion that damages at law could never be adequate to compensate for the breach of a contract to transfer an interest in land.").

47. See, e.g., *Burr v. Bloomsburg*, 138 A. 876, 881-82 (N.J. Ch. 1927) (granting specific performance for the sale of a ring of sentimental value).

48. *Pusey v. Pusey*, (1684) 23 ENG. REP. 465, 465 (Ch.). "The court awarded the plaintiff specific performance and possession of the horn because the horn had sentimental value for the plaintiff as a family heirloom." *Burr*, 138 A. at 878.

49. See, e.g., *Cumbest v. Harris*, 363 So.2d. 294, 297 (Miss. 1978) (noting that sentimental value of stereo equipment could be demonstrated by the fact that the complainant designed and built many of the components himself).

50. DOBBS, *supra* note 22, § 2.5 (noting that specific performance may be granted when items are not unique but are "sufficiently unusual that money does not seem to be a good substitute"). Here, it is important to note that the sentimental attachment artificially undermines the presumptive fungibility of products on the open market. This should be distinguished from instances in which market unavailability is due to an actual absence of

fungibility of emotive items is not defined in terms of material interchangeability, so, hypothetically, an exact physical copy of the good could still constitute inadequate compensation.<sup>51</sup> The goods are instead unique because they have “some peculiar value above the market value, such as heirlooms, paintings, or other works of art.”<sup>52</sup> The courts once more look to the subjective sentimentality expressed by the victim of the breach, but these tribunals cannot simply accept the purchaser’s statement as to the value of the sale, due to the incentive he would have to inflate the item’s worth.<sup>53</sup> There is also a converse risk of undervaluation if the court attempts to assess the subjective value to a reasonable person in the purchaser’s position.<sup>54</sup> To avoid this potential for over- or under-valuation, courts turn to equity and award specific performance in these cases.

### 3. Goods that are Unavailable on the Market

While sentimental attachment is a sort of manufactured market scarcity, courts have also realized the usefulness of ordering specific performance when a good without notable sentimental value is irreplaceable simply because of its relative unavailability on the market.<sup>55</sup> For example, after World War II, when new cars were difficult to locate, a court awarded specific performance of a contract to sell an automobile because a new car “could not be obtained elsewhere except at considerable expense, trouble[,] or loss, which cannot be estimated in advance.”<sup>56</sup> Damages were an inadequate remedy because the injured party could not use the money to purchase a replacement.

Despite the conceptual distinction between incalculability and inadequacy, these flaws are often cited in tandem to defeat the judicial preference for damages and require a party to specifically perform its contractual obligation. A city resisting franchise

---

similar goods on the market. For a discussion of the latter justification for specific performance, see *infra* Part II.b.3.

51. For example, if Bob contracted to buy a specific piano from Jane because it was the piano his mother once played, then another piano of the same make and model could not be delivered in satisfaction of Jane’s promise.

52. *Cooper v. Roland*, 130 S.W. 559, 560 (Ark. 1910).

53. *HARRIS ET AL.*, *supra* note 36, at 170.

54. *Id.*

55. See, e.g., *Sedmak v. Charlie’s Chevrolet, Inc.*, 622 S.W.2d 694, 700 (Mo. Ct. App. 1981); see also *Harahan v. FairMarket Life Settlements Corp.*, No. 05-73548, 2006 WL 3103717, at \*3 (E.D. Mich. Oct. 31, 2006) (stating that the Michigan Supreme Court grants specific performance for personal property when the object is “rare[] and cannot be obtained elsewhere”).

56. *Boeving v. Vandover*, 218 S.W.2d 175, 178 (Mo. Ct. App. 1949).

relocation and asking for a specific performance remedy may benefit from a similar two-pronged argument. To successfully argue incalculability and inadequacy, however, an analogy must be made between the franchise lease agreement and other contractual agreements subject to enforcement through an award of specific performance. To complete this analogy requires an in-depth understanding of the sports franchise lease contract.

### III. OVERCOMING THE RELUCTANCE TO AWARD SPECIFIC PERFORMANCE IN LEASE CONTRACTS

On its face, the sports franchise lease contract is the conveyance of a leasehold estate in the land.<sup>57</sup> Much to the dismay of cities seeking to retain their professional sports teams, the battleground of landlord-tenant disputes is not one from which claims for specific performance often emerge victorious. More specifically, this remedy is very rarely awarded to a landlord for a tenant's breach of the lease contract, with judges instead preferring to award damages.<sup>58</sup> This end result is logical when one considers that the benefit of the bargain to the landlord is typically expressed in terms of rent owed, and, therefore, damages will be an adequate and contractually quantified remedy. Depending on the state,<sup>59</sup> the landlord will likely be forced to choose between three available options. He can: (i) sue the tenant for rent value as it becomes due; (ii) lease the premises to a substitute

---

57. Most courts accept the intuitive conception of a sports franchise lease contract as a lease, without further inquiry into the property interest conveyed. *See, e.g., City of Seattle v. Professional Basketball Club, LLC*, No. C07-1620RSM, 2007 WL 3217556, at \*1 (W.D. Wash. Oct. 29, 2007) (referring repeatedly to what the parties titled the "Premises Use & Occupancy Agreement" as the "Lease"); *Miller v. City of Pittsburgh*, No. 02-0686, 2007 WL 1068467, at \*1 (W.D. Pa. Apr. 4, 2007) (making a factual finding that "PNC Park, including the property outside the stadium running to the curbs of the three public roadways surrounding the stadium, is owned by the Sports and Exhibition Authority, a public body . . . [that] leases this property to the Pittsburgh Pirates"); *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 593 (M.D. Fla. 1995) (noting that "Defendant utilizes the baseball complex owned by the City of Sarasota pursuant to a 'Minor League Baseball Facility Lease'"); *City of Cincinnati v. Cincinnati Reds*, 483 N.E.2d 1181, 1181-82 (Ohio Ct. App. 1984) (recognizing that the city's contract with the MLB franchise was "a lease which is admittedly binding on the Reds[]"). However, some courts prefer to characterize the agreement as a license, because the team does not have the power to exclude the city from possession. *See Golden West Baseball Co. v. City of Anaheim*, 31 Cal. Rptr. 2d 378, 395 (Cal. Ct. App. 1994) (holding, however, that this distinction is "of little importance" and applying contract law principles to interpret the license agreement).

58. However, the prospective tenant might be able to get an award of specific performance given the presumption of the uniqueness of land, as discussed above.

59. *Fall v. Eastin*, 215 U.S. 1, 9 (1909) ("[T]he disposition of real estate, whether by deed, descent, or by any other mode, must be governed by the law of the State where the land is situated." (quoting *Watkins v. Holman*, 41 U.S. 25, 57 (1842))).

tenant and bring an action against the original tenant for the differential in rent; or (iii) terminate the lease and sue immediately for damages.<sup>60</sup> Notably, however, if he pursues the third option, the landlord has a duty to mitigate damages.<sup>61</sup>

The general unavailability of specific performance as a remedy in a lease dispute is subject to some uncommon exceptions. Most notable among these exceptions is the line of cases enforcing a continuous operation clause in a lease contract. In these cases, usually involving the lease of retail space in a shopping center, the landlord includes the clause with the goal of preventing tenants, especially those classified as "anchor tenants," from closing.<sup>62</sup> Some courts have even been willing to imply a continuous operation covenant into a lease.<sup>63</sup> When expressed in the contract, these clauses are typically sought by the landlord because "[s]tore closings, whether temporary or permanent, could affect several aspects of the operation of a shopping center[,] such as the vacancy rate, tenant mix, customer draw, profitability, or the ability to relet the space."<sup>64</sup> These clauses have even more logical force when employed in contracts requiring rent to be paid by tenants in the shopping center as a percentage of earnings, because of the mutual commercial reliance of each tenant.<sup>65</sup> Given that "it is almost impossible to calculate the effects of lost patronage on the other tenants in the shopping center, and the presence of a shuttered or vacant store is likely to project an image of financial instability," courts will sometimes award specific

---

60. CORNELIUS J. MOYNIHAN & SHELDON F. KURTZ, *MOYNIHAN'S INTRODUCTION TO THE LAW OF REAL PROPERTY* 113-15 (4th ed. 2005) (explaining landlords' remedies for breach by tenant); *see also* *Barraco v. Ethel Allan, Inc.*, No. CV 90 081801 S, 1991 WL 57084, at \*2 (Conn. Super. Ct. Jan. 17, 1991) (distilling these options into the choice between suing the tenant who remains on the premises or evicting him and bringing suit subject to the duty to mitigate damages).

61. *Rokalor, Inc. v. Connecticut Eating Enters., Inc.*, 558 A.2d 265, 268 (Conn. App. Ct. 1989) (noting, however, that the duty to mitigate damages does not exist if the landlord elects to continue the lease).

62. *Ingannamorte v. Kinds Super Mkts., Inc.*, 260 A.2d 841, 841 (N.J. 1970) (upholding an express use and occupancy clause in the lease contract for a store that occupied "about one-third of the total floor space in the [shopping] center").

63. *See, e.g., Columbia E. Assocs. v. Bi-Lo, Inc.*, 386 S.E. 2d 259, 262 (S.C. Ct. App. 1989) ("[T]he law will imply an agreement to do those things that according to reason and justice should be done to carry out the purpose for which the contract was made.").

64. *Patton v. Simon Prop. Group, Inc.*, 370 F. Supp. 2d 846, 849 (E.D. Ark. 2005).

65. *Lincoln Tower Corp. v. Richters' Jewelry Co., Inc.*, 12 So. 2d 452, 453 (Fla. 1943) (arguing that, "because a client or customer of any place of business in the locality was a potential client or customer, at least, of all the others," adherence to the clause was for the "benefit of all"); *Dover Shopping Ctr., Inc. v. Cushman's Sons, Inc.*, 164 A.2d 785, 790 (N.J. Super. Ct. App. Div. 1960) (justifying injunction in a shopping center because "each store's success [is] dependent on the continued operation of the other stores").

performance due to the “inadequacy of damages or other legal remedies.”<sup>66</sup>

\*\*\*

However, despite the temptation to view them as similar, sports franchise leases are undoubtedly a different type of contract than typical leases, because the value of the contract is not captured in the rental amount. In order to attract franchises to their metropolitan areas, cities often sign leases requiring the tenant to pay less than market-value for rent.<sup>67</sup> These franchises are typically members of professional leagues that are able to fix the quantity of teams in the market so as to ensure demand and foster economically beneficial competition between cities.<sup>68</sup> “The mismatch between supply and demand greatly enhances the power of teams and leagues in their dealings with places.”<sup>69</sup> Consequently, some cities require only a nominal rental fee,<sup>70</sup> and others do not require rental payments at all.<sup>71</sup> In fact, some cities even end up paying the franchise to remain in the stadium, as was the case with San Diego, which promised to subsidize the local National Football League franchise if ticket sales did not reach a certain threshold amount.<sup>72</sup> It is no stretch to say, as did one court, that “[t]he City, as a corporate body, has not, will not,

---

66. ROBERT S. SHOSHINKI, *AMERICAN LAW OF LANDLORD AND TENANT* 241 (1980).

67. Gerald A. Carlino & N. Edward Coulson, *Should Cities Be Ready for Some Football? Assessing the Social Benefits of Hosting an NFL Team*, FED. RESERVE BANK OF PHILA. BUS. REV., Second Quarter 2004, 7, at 8, available at <http://www.philadelphiafed.org/research-and-data/publications/business-review/2004/q2/brq204jc.pdf>. The prevalence of this practice led a disgruntled voting public in Seattle to pass an ordinance prohibiting the lease of a facility to a sports franchise for below market value. See SEATTLE, WASH., 20 SEATTLE MUN. CODE ch. 20.47, § 1 (2006).

68. Schimmel et al., *supra* note 1, at 214. This artificial scarcity of supply ensures that owners will always have a viable threat of relocation that can be, and regularly is, employed to garner increased public subsidies, more favorable lease agreements, and, most commonly, new stadiums. PHIL SCHAAF, *SPORTS INC.* 211 (2004).

69. DANIELSON, *supra* note 3, at 16.

70. For example, Chicago charges the White Sox franchise of Major League Baseball one dollar in rent. Carlino & Coulson, *supra* note 67, at 8. The Los Angeles Rams moved to St. Louis “in exchange for a low rent (just \$250,000 a year)[] while receiving all luxury box and concession revenues and 75 percent of advertising and naming rights fees—plus a \$46 million relocation fee.” CAGAN & DEMAUSE, *supra* note 2, at 32–33.

71. DANIELSON, *supra* note 3, at 3 (noting that the Cleveland Browns relocated to Baltimore when the owner was offered “\$65 million upfront, a new stadium rent free, and bountiful revenues from luxury seating, concessions, and advertising”).

72. SCHAAF, *supra* note 68, at 211 (noting that, according to the terms of the Chargers’ lease with San Diego, “[i]f the team [failed] to sell sixty thousand tickets to a game, then the city [had] to buy the difference”); ROBERT C. TRUMPBOR, *THE NEW CATHEDRALS* 43 (2007).

[n]or was it intended to make a profit from stadium rental.”<sup>73</sup> The dissimilarity between a sports franchise lease and the typical commercial lease means that traditional remedies requiring rental payments for breach of a lease contract are grossly inadequate when attempting to compensate the city for the breach of a sports franchise lease. Instead of rent payments, the true “benefit of the bargain” to the city is the promise by the franchise to play its home games in the city for the duration of its contract.<sup>74</sup>

#### IV. WHAT’S IT WORTH?: THE DIFFICULTY OF ECONOMIC VALUATION OF FRANCHISE PRESENCE

Given the preference in our judicial system for a damage remedy, logic dictates that courts adjudicating breach of sports franchise lease contracts would be predisposed to demand that the team ownership pay the city a damage amount equal to the value of the promise to play.<sup>75</sup> However, to do so would require the difficult determination of the worth of a sports team to the city. In conducting this inquiry, it is useful to analyze the often controversial arguments that are offered by boosters attempting to justify the vast expenditures on public subsidies that often go hand in hand with franchise presence. Through this analysis, it will become clear that the impossibility of accurate economic valuation of the tangible benefits conferred through the presence of a sports franchise is one reason that sports franchise lease contracts should be specifically enforced.

---

73. *City of N.Y. v. N.Y. Jets Football Club, Inc.*, 394 N.Y.S.2d 799, 803 (N.Y. Sup. Ct. 1977).

74. *Metro. Sports Facilities Comm’n v. Minn. Twins P’ship*, 638 N.W.2d 214, 225 (Minn. Ct. App. 2002). Admittedly, “[w]ide variations exist in leases among places and from sport to sport, reflecting differences among facilities in age, size, cost, and financing arrangements, as well as when the lease was negotiated and the bargaining skills of the contracting parties.” DANIELSON, *supra* note 3, at 230. However, the promise to play home games at a specific venue is an essential element of every sports franchise lease contract and thus the central focus of the analysis in this Comment.

75. This value should be differentiated from the market value of the franchise. The market value could hypothetically be calculated by comparing the prices paid for franchises in that league. “The NFL, for example, sold the Cleveland Browns expansion franchise in 1998 for \$530 million; in 1999 the Washington Redskins team was sold for \$800 million; and in that same year an expansion franchise for Houston garnered \$700 million for the NFL.” Thomas A. Piraino, Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. REV. 889, 891–92 (1999). However, what is at issue in the lease contract is not the sale of the team but the performance thereof, so the question is not the worth of the franchise on the market but rather the worth of the franchise in its market.



A. *Increase in Taxable Spending and the Number of Taxable Residents*

The most central and frequently debated claim made by advocates of public financial support of sports franchises is that the presence of a sports team spurs economic growth for the city. One prong of the argument is that event-related expenditures will boost overall local spending. Reports commissioned by these advocates note that fans attending sporting events generate revenue for the city through a variety of means—spanning from ticket and souvenir purchases to dining, transportation, and lodging expenditures.<sup>76</sup> These direct expenditures can benefit local residents, “who then re-spend part of this income when purchasing other local goods and services.”<sup>77</sup> Yet, critics often respond that the money local residents commit to financing a trip to the ballpark would be spent on other entertainment opportunities if the sports team was not in town, so the same multiplied benefits would accrue regardless of the presence of the franchise.<sup>78</sup>

In response to this criticism, much of the claimed potential for economic growth is based on the attraction of outsiders into the confines of the city.<sup>79</sup> The spectacle of the sport itself can draw people into the area, and the anticipated boost to tourism is often part of the argument advanced for soliciting professional sports franchises. Sports allegiances do not stop at the city borders, so many of the “hometown fans” actually reside outside of the municipal boundaries and will enter the city in order to support their team.<sup>80</sup> Given the inherent rivalry with the opponent, supporters of the visiting team can also be expected to visit.<sup>81</sup> Visitors to the city are more likely to spend money on rental cars, hotel rooms, dining

---

76. See, e.g., WILLIAM B. BEYERS, KEYARENA ECONOMIC IMPACT STATEMENT tbl.15 (2006), [http://www.citizensformoreimportantthings.org/KeyArena\\_Beyers%20FINAL%202.21.06.htm](http://www.citizensformoreimportantthings.org/KeyArena_Beyers%20FINAL%202.21.06.htm) (last visited Dec. 24, 2008).

77. Carlino & Coulson, *supra* note 67, at 9. The extent to which this re-spending occurs is expressed as the “multiplier effect.” Indeed, the inflation of the value of the multiplier effect has been credited with the exaggerated economic impacts in reports from boosters. *Id.*

78. TRUMBOUR, *supra* note 72, at 40.

79. Mayer, *supra* note 3, at 212.

80. For example, thirty-six percent of the visitors to Seattle’s KeyArena who come to watch basketball games are from outside of the county in which Seattle is located. BEYERS, *supra* note 76, at tbl.7.

81. One study concluded that approximately eight percent of the visitors to KeyArena were from a state other than Washington. *Id.* Furthermore, factors such as the proximity of the opponent to the host city or the existence of a “rivalry game” may increase these numbers during individual contests.

services, and tourist attractions than are local residents, so, by drawing these game-day tourists into town, there is an expectation of increased expenditure in the services sector of the city's economy.<sup>82</sup>

Broadcast contracts with the media can also lead to increased expenditures by visitors. Although "broadcast revenues are usually retained by the team,"<sup>83</sup> the broadcast of the team's games is akin to free advertising for the city. Sports events are so widely televised and reported that "the athletic achievements of professional sports teams often overshadow the civic accomplishments of America's great cities in national press coverage."<sup>84</sup> The Mayor of Charlotte, North Carolina, Pat McCrory, in defending the addition of the city's new professional basketball franchise, noted that, when "your score is given on TV, it puts you in the big leagues as far as drawing attention to your city . . . ."<sup>85</sup>

However, this "advertising" is not focused on luring only game-day spectators. Indeed, boosters argue that the presence of a sports team can attract new long-term corporate residents.<sup>86</sup> As the American workforce becomes increasingly mobile, cities find themselves engaged in competition against other cities to attract capital.<sup>87</sup> Thus, cities endeavor, through a variety of means, to attract new firms. Various studies conclude that the amenities offered by a city can influence these relocation decisions by increasing the value of the destination.<sup>88</sup> The presence of a sports team is different from other amenities. For example, "[t]he facilities built for sports teams and events, because of their size and the number of people they attract . . . [,] have become defining elements or architectural statements for many cities and regions."<sup>89</sup> Indeed, "major sporting events, franchises, new stadia[,] and other sport-related experiences

---

82. *Id.* at tbl.16.

83. Timothy N. Brown, *Stadium Leases*, in 3 THE COMMERCIAL PROPERTY LEASE 225, 231 (Patrick A. Randolph, Jr. ed., 2000).

84. TRUMPSBOUR, *supra* note 72, at 5.

85. EVAN WEINER, THE BUSINESS & POLITICS OF SPORTS 229 (2005). It is worth noting that the same benefit may not be received by a city that hosts a team whose name is not attached. Examples would include Foxboro, Massachusetts, which hosts the New England Patriots, Charlotte, North Carolina, where the Carolina Panthers play, or Arlington, Texas, which is home to the Texas Rangers.

86. Mayer, *supra* note 3, at 212.

87. DAVID L. ANDREWS, SPORT—COMMERCE—CULTURE 96 (2006) ("[C]ities compete against each other to attract capital investment from corporate, governmental, and retail sectors.").

88. Carlino & Coulson, *supra* note 67, at 8 ("[P]eople are willing to pay indirectly for local amenities . . . in the form of higher rents and lower wages.").

89. ROSENTRUB, *supra* note 4, at 64.

have become among the most effective vehicles for the advancement of internally and externally identifiable places.”<sup>90</sup> Consequently, if a city has a sports team, it is arguably more likely to attract additional capital investment.<sup>91</sup> This increased investment has the consequence of improving the city’s tax base, an obvious tangible benefit.

Even if new employers are not drawn to the city, boosters argue that the existence of a sports franchise creates jobs. Employees are needed to perform a litany of tasks associated with the stadium’s hosting of a sporting event, including manning parking lots, taking tickets, operating concession stands, running scoreboards, and providing security, just to name a few. If the projected tourism increase materializes, local businesses in the service sector would likely also hire workers in response to increased demand. However, critics respond that these jobs are typically low paying and, in large part, constitute only short term or seasonal employment.<sup>92</sup> While indoor stadiums can operate year-round as convention centers or concert venues, many sports-related facilities are specifically designed to meet the needs of a single tenant, and, as such, stadium labor is only significant during the tenant team’s season.<sup>93</sup> These criticisms are valid, but long-term jobs are also created when a sports team comes to town. Sports franchises, like many other businesses, have a need for sales, marketing, and administrative professionals. Jobs are also created outside of the front office and include, most obviously, those positions filled by coaches, staff, and players. “Because athlete salaries tend to be high, even a small increase in the number of local resident players translates into appreciable tax revenue for the city.”<sup>94</sup> A more forceful objection to the argument that sports teams bring

---

90. ANDREWS, *supra* note 87, at 97.

91. ROSENTRAUB, *supra* note 4, at 151 (“Many community leaders support actions to attract and retain teams because of the belief that the presence of professional sports franchises persuades other firms to locate in a community” without questioning the validity of that belief.) When corporations relocate to a city, the related relocation of their employees to the city may also augment the municipal tax base. Obviously, not all employees attracted to firms in the city will actually reside in the city itself, but it is safe to assume that employees working in the city will at least contribute marginally to the revenue stream within the city limits.

92. In Seattle, sixty-four percent of the workers employed by the Seattle Center were seasonal employees. BEYERS, *supra* note 76, at fig.7.

93. Of course, a stadium may require some year-round maintenance, but the bulk of the job creation occurs when the venue is hosting an event.

94. Indeed, “revenues associated with Sonics players living in the Seattle area” were cited among the “large financial benefits” created by the presence of the Sonics in the initial complaint in the litigation between the City and the team. Complaint for Declaratory Relief at \*4, *City of Seattle v. Prof’l Basketball Club, LLC*, 2007 WL 5262606 (W.D. Wash. Sept. 24, 2007) (No. 07-2-30997-7 SEA).

jobs to town is made by those who point to the relative cost of job creation through sports team presence as opposed to more traditional means. In his testimony before Congress, Neil deMause stated poignantly that, in light of the public subsidies that often finance sports stadiums, while “good job-development programs can cost about \$10,000 for each new job created, sports facilities typically come in at as much as \$250,000 in public cost for each new job . . . .”<sup>95</sup>

### B. *Urban Renewal*

Regardless of whether or not their faith is well founded, cities often rely on the anticipated economic growth associated with sports teams and frequently use the construction of sports stadiums as part of concentrated efforts at urban renewal projects.<sup>96</sup> By building arenas in downtown areas, city planners hope to “attract large crowds to the area to underscore its vitality, centrality, and potential for additional economic activity and development.”<sup>97</sup> The most dramatic example of this strategy exists in Baltimore, where the construction of Camden Yards, home of Major League Baseball’s Orioles franchise, was undertaken as part of an attempt to revitalize the downtown area of a city that had fallen into ruin.<sup>98</sup> When a stadium is built, it can thus represent a commitment by the city to urban revival of the downtown area. This fact alone is useful in the argument for specific performance.

As mentioned above, courts have been willing to command specific performance of the commercial lease of an anchor tenant in a shopping center because of that tenant’s necessity to the success of surrounding businesses and the profit of their common landlord.<sup>99</sup> Sports teams are analogous to the anchor tenants in these shopping centers,<sup>100</sup> and the city’s tax collection is similar to a percentage rent clause in a shopping center contract because the amount paid

---

95. *Taxpayer Financed Stadiums, Convention Centers, and Hotels: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight and Government Reform*, 110th Cong. 2 (2007) (statement of Neil deMause), <http://oversight.house.gov/documents/20070329144749-35526.pdf>.

96. Schimmel et al., *supra* note 1, at 233–34.

97. Matthew J. Parlow, *Publicly Financed Sports Facilities: Are They Economically Justifiable? A Case Study of the Los Angeles Staples Center*, 10 U. MIAMI BUS. L. REV. 483, 492 (2002).

98. ANDREWS, *supra* note 87, at 95–107.

99. See *supra* notes 62–66 and accompanying text.

100. Bruce W. Burton & Matthew J. Mitten, *New Remedies for Breach of Sports Facility Use Agreements: Time for Marketplace Realism*, 88 IOWA L. REV. 809, 851–54 (2003) (drawing this analogy to support argument for liquidated damages clauses in these leases).

depends on the profits made by the business. There is an understood expectation that the city is relying on the sports stadium to draw consumers to the area to boost the local economy, especially when stadium construction is undertaken as part of an urban redevelopment project. Just as the surrounding businesses in a strip mall would suffer tremendously from an anchor tenant “going dark,” the local businesses developed around the stadium would suffer were the team to relocate. As such, the city would suffer a loss of tax revenue because of the decrease in profitability of the surrounding businesses.

### C. Opportunity Costs

Blinded by the promise of future economic development, some cities have subsidized franchise development and ignored important infrastructure needs. Critics of the argument that franchise presence leads to economic growth contend that money spent on stadium building or team retention might better be spent on more pressing social issues.<sup>101</sup> Thus, the valuation of a franchise must also take into account the opportunity costs that are paid when a city decides to invest in sports over “things like hospitals, education, raises for civil servants, infrastructure, and social welfare programs.”<sup>102</sup> For example, the city of Cleveland spent billions in recent years on new stadiums for their baseball and basketball franchises only to suffer through blackouts without a backup generator to ensure consistent water supply to its residents.<sup>103</sup>

### D. Is There Really an Economic Benefit?

While the aforementioned benefits are commonly associated with sports teams by franchise advocates, there remains considerable disagreement as to whether these benefits ever materialize. Indeed, the difficulty of valuation of sports franchise presence is reflected in the wide variation between economic impact studies conducted by local boosters and academic scholars. Despite claims of objectivity,

---

101. Indeed, the current legislation in Seattle sparked the organization of a public interest group, called “Citizens for More Important Things,” which calls on the City to invest in “schools, healthcare, and affordable housing.” See Citizens for More Important Things, <http://www.citizensformoreimportantthings.org> (last visited Dec. 24, 2008). But see Schimmel et al., *supra* note 1, at 237 (“[F]unding used for franchise subsidy usually originates from a city’s capital budget, whereas public service funding originates from a city’s operational budget.”).

102. SCHAAF, *supra* note 68, at 230.

103. WEINER, *supra* note 85, at 133.

boosters are often motivated by a desire to convince the city to support subsidies to pay for stadium construction.<sup>104</sup> As might be expected, these studies often claim that sports teams represent a multi-million dollar potential benefit to the city. Even assuming that these “advocacy reports” accurately reflect revenue, the numbers that they generate “are small compared with the existing tax revenues and local economy.”<sup>105</sup> Academic reports, in contrast, claim that there is significantly less effect on the economy of the city than the boosters would have the voters believe. Some studies find the economic benefits negligible, as did a study of Indianapolis, which concluded that “there were no significant or substantial shifts in economic development.”<sup>106</sup> Other reports claim that there is actually a negative effect on the local economy.<sup>107</sup> Furthermore, given the typical longevity of a team’s stay in a particular city, the residents themselves often begin to question whether having a sports team has been a guaranteed stimulant for the local economy.<sup>108</sup>

\*\*\*

The uncertainty of these residents seems warranted by the inconclusiveness of the debate over the economic benefit of franchise presence. As the above discussion illustrates, it is extremely difficult to put a fair price tag on the performance required under a sports

---

104. TRUMPBOUR, *supra* note 72, at 39 (“[T]he goal is often retention or attraction of a team, not necessarily preparation of an objective document.”).

105. Coates & Humphreys, *supra* note 7, at 17. This article notes that, in 1999, a study estimated that a new stadium in Baltimore would generate \$3.8 million in taxes and \$100 million in earnings. The authors further calculate that these figures would represent 0.7% of the city’s tax collections and 0.72% of Baltimore’s total income. *Id.* at 16.

106. Mark S. Rosentraub et al., *Sport and Downtown Development Strategy: If You Build It, Will Jobs Come?*, 16 J. URB. AFF. 221, 236 (1994). A 1994 study by Robert Baade examined forty-eight American cities over thirty years and concluded that “professional sports teams generally have no significant impact on a metropolitan economy.” Robert A. Baade, *Stadiums, Professional Sports, and Economic Development: Assessing the Reality*, HEARTLAND INSTITUTE POLICY STUDY NO. 62, at 19 (1994), available at [http://www.cppa.utah.edu/Perspectives/v2i7\\_Baadeforpub.pdf](http://www.cppa.utah.edu/Perspectives/v2i7_Baadeforpub.pdf).

107. See, e.g., KEVIN J. DELANEY & RICK ECKSTEIN, PUBLIC DOLLARS, PRIVATE STADIUMS 30 (2003) (“[I]n seven of the nine cities they examined, the city’s share of regional income actually declined after adding a team or a new stadium.”); Coates & Humphreys, *supra* note 7, at 19 (“The presence of professional sports teams, on average, reduces the level of real per capita income in metropolitan areas.”).

108. See DELANEY & ECKSTEIN, *supra* note 107, at 27 (noting that the public is growing skeptical of the correlation between the presence of stadiums and economic growth). In a remarkable irony, during the recent litigation between the City of Seattle and the Supersonics, the team’s lawyers argued that “there will be no net economic loss if the Sonics leave Seattle.” Jim Brunner, *Sonics: City Wouldn’t Miss Us*, SEATTLE TIMES, Jan. 18, 2008, at B1, available at [http://seattletimes.nwsources.com/html/sonics/2004131860\\_sonics18m.html](http://seattletimes.nwsources.com/html/sonics/2004131860_sonics18m.html).

franchise lease contract. Drawing on precedent, specific performance could be awarded based on this fact alone.<sup>109</sup> However, to the extent that specific performance is an appropriate remedy, it is not necessarily important if the economic benefit conferred on the city is great or negligible.

#### V. WHAT'S IT TO YOU?: THE NONPECUNIARY BENEFIT OF THE BARGAIN

Under the legal framework outlined above, the more compelling argument is that damages of any amount would be inadequate because they would prove incapable of placing the city in a similar position as if the promised performance had been given. What is more important under this theory is the extent to which economic benefits are (or are not) the only benefits that cities reap from lease contracts with professional sports teams. Putting the difficulty of quantifying the benefits aside, if purely economic benefits captured the entire benefit of the bargain, the court would render a just remedy by simply enforcing a damage remedy.<sup>110</sup> The amount of the remedy, although likely a pittance in comparison with the cost of stadium construction, for instance, would place the city in the same situation as if the team had performed. However, the primary benefits that a city enjoys as a result of the presence of major league franchises are not economic in nature. Indeed, "[m]ost of the true benefits sought by the municipality in a leasing arrangement with a major league professional team are intangible, but highly valued, psychological factors."<sup>111</sup>

##### A. *Social Identity*

The presence of a sports team serves an important social function for members of a city through the provision of social identity. Psychologists note that, especially in an urban environment, which fosters less focus on the individual, people gravitate toward sports teams because fan allegiance provides them with a sense of community belonging and group identity.<sup>112</sup> Sport spectatorship can transcend ethnic, religious, and social boundaries, thus providing a unique opportunity for group cohesion and fostering community

---

109. See *supra* notes 53–54 and accompanying text.

110. If the city made a bad deal (i.e., paid more for a stadium than it could recoup in ticket sales and concessions), it would not be rescued by the court, unless the contract was deemed unconscionable.

111. Burton & Mitten, *supra* note 100, at 818.

112. ARNOLD BEISSER, *THE MADNESS IN SPORTS* 117–21 (1977).

acceptance in ways that other group membership may not. This group cohesion can have valuable personal and interpersonal effects, because "the presence of a highly salient group identity produces . . . enhanced individual feelings of self-esteem in reference to group membership, or collective self-esteem."<sup>113</sup>

Defining individual identity necessitates distinguishing others.<sup>114</sup> Inasmuch as sport facilitates such introspection and self-actualization, it also enables group members to differentiate themselves from members of other groups.<sup>115</sup> When a team associates with a city, the fans bind together and begin to acknowledge and romanticize the differences between other cities and their own.<sup>116</sup> "For millions in the urban setting[,] the local ball team (usually a professional team) is an important, if not the predominant, basis for identification with the city."<sup>117</sup> The resulting relative community pride is bolstered by the inter-city competition that is inherent in professional sports leagues. Even the style of play of the sports team can resonate within the community identity, such as when Pittsburgh fans rally around the hard-nosed smash-mouth run game of the Steelers because it represents the blue-collar mentality of the city.<sup>118</sup>

Sport is also valuable as a means of image projection. "It is commonly believed that hosting a professional sport franchise enhances a community's prestige."<sup>119</sup> This particular power of sport has historically had effects at both the national and international levels. Scholars and political scientists have recognized the value of sports allegiance in the nationalistic sense, even to the point of noting that sport is "one of the most influential activities involved in the production of a modern national identity."<sup>120</sup> Sport can be used to

---

113. Audrey J. Murrell & Beth Dietz, *Fan Support of Sports Teams: The Effect of a Common Group Identity*, 14 J. SPORT EXERCISE AND PSYCHOL. 28, 29 (1992).

114. JOSEPH MAGUIRE ET AL., SPORT WORLDS: A SOCIOLOGICAL PERSPECTIVE 143 (2002) ("Human beings seem to feel a need to display togetherness as well as difference and distinction.").

115. *Id.* at 137-41.

116. Michael Winerip, *It's Not Just a Game: The City—Suburban Tensions of an Ohio County*, N.Y. TIMES, Mar. 17, 1996, at 22, available at <http://query.nytimes.com/gst/fullpage.html?res=9F02E7D61139F934A25750C0A960958260>.

117. Emil Bend, *Some Functions of Competitive Team Sports in American Society* (1970) (unpublished Ph.D. dissertation, University of Pittsburgh) (on file with Davis Library, University of North Carolina at Chapel Hill).

118. Jere Longman, *Pittsburgh: A Big Happy Company Town*, N.Y. TIMES, Jan. 12, 2005, at D1.

119. Schimmel et al., *supra* note 1, at 222. "Having a team is widely seen as the mark of being a big league city, [while] losing one is perceived as a serious blow to a place's status." DANIELSON, *supra* note 3, at 102.

120. S.W. POPE, PATRIOTIC GAMES 4 (1997).



project national superiority,<sup>121</sup> as was evident when Americans swelled with national pride after the 1980 Olympic men's hockey team was victorious over their Soviet opponents.<sup>122</sup> The joy surrounding this victory on the ice resulted from not only athletic success, but also from a deeper social understanding that, because of the representative value of sport, the win represented a victory of democracy over communism.<sup>123</sup> In this regard, it can be said that "[s]port and specifically sportspeople can serve as national representatives not just for sport but also for ideology and identity."<sup>124</sup> However, sports teams need not win on the international stage to dramatically represent the national identity. Nations can benefit merely from participation, such as when the countries of Croatia, Slovenia, and Bosnia and Herzegovina were able to participate in the 1992 Summer Olympics as newly independent countries, thus affirming their independence to the world.<sup>125</sup> Nor is it necessary that the team represent an entire nation to confer similar identity benefits. The very same qualities of sport that draw together a national community and allow a team to speak for the populace are present in local sports as well.

If cities are seen as engaged in a battle for capital, the extent to which sport can play a role should not be underestimated. By developing a strong civic identity and pride among its populace, sports can help a city to retain its workforce.<sup>126</sup> If sport is used effectively as a tool for image projection, it could also be used to attract outsiders to the community who are drawn by this athletic advertising.<sup>127</sup> Local growth coalitions and politicians alike have

---

121. This use of sports as an assertion of dominance has been misused as well, with the most notable case occurring in the propaganda-laden presentation of the Summer Olympics in 1936, which Hitler used to advance the Nazi cause. See BARRY D. MCPHERSON, JAMES E. CURTIS & JOHN W. LOY, *THE SOCIAL SIGNIFICANCE OF SPORT* 105 (1989) ("Hitler hosted the 1936 Nazi Olympics to demonstrate the superiority of the German race.").

122. Serge Schmemann, *Drama and Scandal Make the Olympics*, N.Y. TIMES, Feb. 19, 2002, at D3 ("Back in 1980, it was the huge overlay of ideology and national pride—and not the quality of play—that made the American hockey victory over the Soviet team a Miracle on Ice.").

123. *Id.*

124. MAGUIRE ET AL., *supra* note 114, at 70.

125. See Michael Janofsky, *Games Begin With a Shot of Catalanian Spirit*, N.Y. TIMES, July 26, 1992, at L1. Formerly, these countries had been part of Yugoslavia. *Id.*

126. There are undoubtedly additional, more persuasive forces that influence the mobility of the workforce, but the argument here is that community identity fostered through sports allegiance can play a role in the decision-making process of an individual considering relocation.

127. See *supra* notes 79–83 and accompanying text.

realized this potential use of sports, and a focus on the intangible benefits has become more central in their efforts to attract and retain sports teams.<sup>128</sup>

In summary, the identity benefits conferred upon the city by a franchise presence are twofold. First, to the extent that the city is concerned with the cohesion and social well-being of its inhabitants, the effects of spectatorship on the individual become relevant. Perhaps more compelling is the way in which sports come to define and represent the collective community both internally and externally. Because of these "identity contributions," sports teams offer a unique and special value to the city, in much the same way that land does to the real estate purchaser.

### B. *Sentimental Attachment*

Given the centrality of sports franchises to the collective identity and pride of a city, it can be inferred that the city's populace develops a strong sentimental attachment to the team. Damages would be an inadequate remedy in cases of breach of sports franchise leases because the value of sentimental attachment is highly speculative.<sup>129</sup> But, proving sentimental attachment can be a difficult task. By definition, "sentimental" means "[r]esulting from or colored by emotion rather than reason or realism."<sup>130</sup> Some items are inherently sentimental, such as wedding rings and family heirlooms,<sup>131</sup> so, in some sense, sentimentality can be argued through general social understanding of the emotion attached. The emotion generated by spectator sports should therefore not be underestimated.

Sentimental attachment can also be developed through historical interaction with an item or place, such as when a person has a sentimental attachment to a cottage because it was the setting for past experiences with family.<sup>132</sup> Generations of families grow up going to the ballpark and rooting for their hometown team. The history of a sports team is intertwined with the history of its fans, and these allegiances can last long after that team leaves for greener pastures.

---

128. See DELANEY & ECKSTEIN, *supra* note 107, at 22 ("Justifications emphasizing community self-esteem and community collective conscience became more popular in the late 1990s and into the twenty-first century.").

129. See *Carpel v. Saget Studios, Inc.*, 326 F. Supp. 1331, 1333 (E.D. Pa. 1971) (stating that the sentimental value of wedding pictures was "so highly speculative that it is not a proper element of damages for consideration by the jury").

130. AMERICAN HERITAGE COLLEGE DICTIONARY 1264 (4th ed. 2007).

131. RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt. b (1981).

132. See *Phillips v. Ryan*, No. CV-91-123, 1993 Me. Super. LEXIS 293, at \*1-2 (Me. Super. Nov. 12, 1993).

The uniforms, mascots, team colors, and most importantly, the name of a particular franchise come to mean something to the city that cannot be easily replaced. In recognition of the value of this aspect of community history, the city of Cleveland, which was the victim of an NFL franchise relocation, negotiated for the retention of the trademark, colors, and team records of the Browns franchise in a settlement with the team owner.<sup>133</sup>

Because of the inherently emotional nature of sentimental attachment, aside from evidence of a person's assertions of attachment, it is difficult to show true emotional connection.<sup>134</sup> Such attachment can arguably be demonstrated by irrational actions taken with regard to an object, as when someone rushes into a burning house to rescue family photo albums. In this respect, the exorbitant public subsidies that are often paid by taxpayers to support a local sports team might be further evidence of a sentimental attachment.<sup>135</sup>

### C. *Inability to Cover on the Market Undermines Damage Remedy*

The damage remedy proves inadequate not only because of the inability of money to capture the value of the franchise to the city, but also because of the inability of money to replace the value lost. It would be practically impossible for a city to use a damage remedy to secure a sufficient substitute on the open market. Even setting aside the fact that goods to which there is a sentimental attachment are not materially interchangeable, the city seeking a substitute team would

---

133. See Don Nottingham, *Keeping the Home Team at Home: Antitrust and Trademark Law as Weapons in the Fight Against Professional Sports Franchise Relocation*, 75 U. COLO. L. REV. 1065, 1072 n.33 (2004). In contrast, despite efforts by the City of Seattle to negotiate for rights to the logo, name, colors, and memorabilia associated with the Sonics, the terms of the settlement reached between the City and Sonics owner Clay Bennett allow Bennett to retain ownership of those rights. The Professional Basketball Club, LLC and City of Seattle Settlement Agreement Memorandum of Understanding 3 (July 2, 2008) (on file with the North Carolina Law Review) [hereinafter Settlement Agreement Memorandum] (outlining the agreement between the Professional Basketball Club, LLC and the City of Seattle); see also Percy Allen, *A Tale of Two Cities Sharing One History—"Shared History" Details Still Being Worked Out; Bennett Owns the Title Trophy*, SEATTLE TIMES, July 6, 2008, at D1, available at [http://seattletimes.nwsources.com/html/sonics/2008035532\\_soni06.html](http://seattletimes.nwsources.com/html/sonics/2008035532_soni06.html) (noting, however, that Bennett has agreed to return ownership of these rights to the City if Seattle establishes another NBA franchise).

134. It might be only slightly easier to disprove assertions of sentimental attachment, such as by showing a person's prior attempt to convey the land to which they claim attachment. See *In re Estate of Olson*, 2008 SD 4, ¶69, 744 N.W.2d 555, 577.

135. However, the counterargument could be made that these subsidies are made to retain sports in general, not necessarily to retain the specific sports team in question. Without an analysis of voter motivation and in light of the aforementioned economic irrationality of these subsidies, the claim that these subsidies evidence sentimental attachment is not unfair.

be left with the unenviable options of luring an existing franchise to the city or appealing to the professional leagues to allow an expansion franchise to be located in the city. In considering the viability of these options, it is important to highlight the motivations and practices of the professional sports leagues, as they would constitute the “market” in which the city would seek a replacement.

Each of the professional sports leagues was first formed as a profit maximizing cooperative.<sup>136</sup> The fact that sports leagues thrive off of the manufactured scarcity of their product is especially relevant to the availability of an expansion team.<sup>137</sup> Because there is only a limited amount of wealth and talent available in the sports business,<sup>138</sup> each league has established procedures by which expansion teams can be created. Typically, the decision to expand the league is made by the league office and is only possible if a “super-majority of the existing clubs” agree to expansion.<sup>139</sup> Oftentimes, in order to be granted a new franchise, an additional fee must be paid.<sup>140</sup> League expansion was more common in the past, but the rarity of expansion teams in today’s sports leagues speaks to the formidability of the obstacles blocking that option. For example, the NBA has only conducted nine expansion drafts in league history, and only four teams have entered the league since 1989.<sup>141</sup> Similarly, “since the NFL and AFL merged in 1966, the NFL has added only seven additional teams, even though several markets desire franchises.”<sup>142</sup>

The other option for the city left behind by a relocating franchise would be to entice an already existing franchise to fill the void. This

---

136. See ROSENTRAUB, *supra* note 4, at 78 (“The four [major] sports leagues were originally formed to ensure competition and to attract other investors who might be willing to assume the risks associated with team ownership.”).

137. See *id.* at 96 (“As long as the supply of teams is less than the number of cities that want one, owners can bargain for the best possible deals from different communities.”).

138. Schimmel et al., *supra* note 1, at 222 (noting that league members are resistant to expansion “because increasing the number of franchises in the league dilutes both the capital gain of existing franchises and the player talent pool”).

139. ROSENTRAUB, *supra* note 4, at 79.

140. See Schimmel et al., *supra* note 1, at 222 (“When a league decides to expand, its members determine the location of expansion and the price the new team must pay to be included in the league.”).

141. See THE OFFICIAL NBA ENCYCLOPEDIA 75 (Jan Hubbard ed., 3d ed. 2000). Further indicating the market saturation and/or reluctance of the league to expand in America is the fact that the Charlotte Bobcats are the only American franchise admitted to the league since 1989. See Significant Dates in Basketball History, <http://www.prosportstransactions.com/basketball/Dates.php> (last visited Dec. 24, 2008).

142. Daniel Rascher & Heather Rascher, *NBA Expansion and Relocation: A Viability Study of Various Cities*, 18 J. SPORT MGMT. 274, 275 (2004), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=926214](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=926214).

too would likely prove difficult, though certain factors would work in the city's favor. Most notably, "[i]n franchise relocation decisions the courts have ruled that individual sports teams act as individual competitors rather than as a unified organization."<sup>143</sup> Thus, cities at least benefit from the ability to focus their persuasive efforts on singular owners rather than seek approval from the entire group of owners. Furthermore, "due to the uncertain enforceability of [league restrictions on relocation] and the lack of resolve by the leagues to seek to enforce them, the sports franchises have been able to relocate at their discretion."<sup>144</sup> However, teams typically relocate because they anticipate a more attractive financial situation in a new market, either through sheer size of the new territory or through "sweetheart stadium deals."<sup>145</sup> The fact that a city already lost its franchise tends to show that it was unable to compete with other cities attempting to draw its team away.<sup>146</sup> It can therefore be confidently assumed that the city would have difficulty wooing a new franchise, especially given the fact that any potential suitor would stand to incur additional costs associated with breaching its current lease. In light of the underlying dispute that resulted in damages, the city would also suffer from its perception as litigious and unwilling to bend to the will of ownership. For these reasons, only rarely does a city replace a sports team with a member of the same league as the departed.<sup>147</sup> NBA Commissioner David Stern affirmed this trend in recent statements he made prior to the conclusion of the litigation between the City of Seattle and the Sonics. Commenting on the likelihood of the NBA's return to Seattle if the Sonics left, Stern said "[i]f the team moves, there's not going to be another team there, not in any conceivable future plan that I could envision."<sup>148</sup>

---

143. TRUMBOUR, *supra* note 72, at 46; see *L.A. Memorial Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1387-90 (9th Cir. 1984).

144. Anzivino, *supra* note 7, at 40.

145. See DANIELSON, *supra* note 3, at 137-39 ("Teams move primarily to improve the bottom line; they seek more customers, higher revenues, lower costs, and better deals in new locations.").

146. *Id.* at 134-35 ("Today, relocation is how almost all places lose teams.").

147. In the NFL, for example, it took Baltimore more than two decades to replace the Colts, despite multiple attempts to entice other franchises.

148. Associated Press, *Stern Criticizes City, State Governments in Sonics Dealings*, Nov. 8, 2007, <http://sports.espn.go.com/nba/news/story?id=3100691>.

The history of the four major sports leagues<sup>149</sup> all but precludes a third option, which would be to replace the team with one from a different league. Replacement of this sort could take one of three forms. One option would be for the city to put a minor league affiliate of the same league in place of the departing franchise. While some of the aforementioned resistance would still exist, it would not be as strong to the proposition of attracting a minor league franchise.<sup>150</sup> Assuming the local market has not shrunk dramatically, the city losing a major sports franchise would likely be capable of supporting a minor league team. Thus, the league at least would stand to benefit economically from the establishment of a minor league franchise, the likes of which are usually located in smaller markets in a large city. However, a minor league team would not be a satisfactory replacement for the city, because the benefits of a minor league franchise are significantly lower. Economically, they are lessened, because minor league teams tend to sell fewer tickets, generate less local business, and draw fewer fans from out of town.<sup>151</sup> In terms of identity benefits, minor league teams are viewed by the public as second-tier replacements, because league affiliation is often used as a metaphor for the status of a community.<sup>152</sup> The quality of the athletic performance and the prestige of the minor league franchise is lower, thus projecting the image of a city that is relatively inferior to its "major league" counterparts.<sup>153</sup> For example, the growth coalition in Cincinnati campaigned vigorously for public subsidies to support the Reds and Bengals franchises around the slogan "Keep Cincinnati a Major League City."<sup>154</sup> Voters supported the subsidy in some instances because they did not want their city to

---

149. The major sports leagues are Major League Baseball ("MLB"), the National Football League ("NFL"), the National Basketball Association, and the National Hockey League ("NHL"). These leagues represent each of the four biggest sports in the country: baseball, football, basketball, and hockey. See CAGAN & DEMAUSE, *supra* note 2, at 28.

150. Consider, for example, the case of baseball, in which "[f]ranchise relocation of minor league teams is more prevalent." Jeffrey Gordon, *Baseball's Antitrust Exemption and Franchise Relocation: Can a Team Move?*, 26 FORDHAM URB. L.J. 1201, 1214 (1999).

151. ARTHUR T. JOHNSON, MINOR LEAGUE BASEBALL AND LOCAL ECONOMIC DEVELOPMENT 7 (1993).

152. See *id.* For example, when rallying support for a new hockey team in Raleigh, North Carolina, one booster remarked that it would take "a unified effort if Raleigh is to move out of the minor leagues." DANIELSON, *supra* note 3, at 103. Perhaps more importantly, fans are not "likely to consider minor leagues as comparable to the four major professional sports leagues." Piraino, Jr., *supra* note 75, at 896.

153. DANIELSON, *supra* note 3, at 103 ("Not having major league teams marks a place as minor league.").

154. DELANEY & ECKSTEIN, *supra* note 107, at 54.

become another Dayton or Louisville, nearby cities with only minor league franchises.<sup>155</sup>

An equally disagreeable option for the city would be to replace the team with another playing the same sport in a different league. The same arguments that militate against the viability of a minor league franchise as a viable replacement hold true here as well. Revenues, caliber of play, and community identity benefits are all significantly lower in leagues other than the NFL, NBA, MLB, and NHL. The second-tier status of leagues in competition with the Big Four has been the result of conscious efforts on the part of the major leagues to "retard the development of competing leagues."<sup>156</sup>

Another way for a city to circumvent the league of which the breaching franchise was a member would be to attract a new major league team that played a different sport. This option depends on the fungibility of the game played. Generally, sports preference is somewhat regionalized.<sup>157</sup> Also, the existing facilities would likely be inadequate, and unless the current stadium was built with this dual-sport design in mind, the city would incur significant costs in converting its current stadium to facilitate other sports.<sup>158</sup> Still, the greatest barrier to this approach would be that "[t]he courts have recognized that from a consumer's perspective, the type of sport produced by a particular league is not reasonably interchangeable with other sports or other forms of entertainment."<sup>159</sup>

### CONCLUSION

Despite the shortfalls of the damage remedy, courts rarely grant specific performance of sports franchise lease contracts.<sup>160</sup> Perhaps

---

155. *Id.* at 55-56.

156. ROSENTRAUB, *supra* note 4, at 73.

157. Hockey is more popular in the North than in other regions of the United States, for example.

158. The dimensions of the playing surface alone often keep stadiums used for one sport from being used to support teams from other athletic endeavors. For instance, only three NFL teams (the Minnesota Vikings, Miami Dolphins, and Oakland Raiders) share their stadiums with members of the other three major leagues, and in each instance, the co-tenant is a baseball team (the Minnesota Twins, Florida Marlins, and Oakland A's).

159. Piraino, Jr., *supra* note 75, at 895; *see also* NCAA v. Bd. of Regents, 468 U.S. 85, 111 (1984) (affirming the factual finding of the trial court that "intercollegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience").

160. For some notable exceptions, *see generally* Metro. Sports Facilities Comm'n v. Minn. Twins P'ship, 638 N.W.2d 214 (Minn. Ct. App. 2002) (granting a temporary injunction preventing the Minnesota Twins from breaching its agreement with the Metropolitan Sports Facilities Commission for the use of the Metrodome); City of N.Y. v. N.Y. Jets Football Club, Inc., 394 N.Y.S.2d 799 (N.Y. Sup. Ct. 1977) (requiring, in part, that

the resistance can be explained by the classic argument that enforcement would cause substantial harm to the other party. Teams sometimes justify their relocation by saying that it would cost them considerably to stay.<sup>161</sup> But, this does not explain the permission of teams to breach contracts simply so they can add to already lucrative profit margins. It should also be noted that, although contractual performance would ultimately require the athletic performance of the team's players, the lease agreement is not a contract for personal services. The players themselves are bound to the franchise owner, not the city, and any loss of autonomy they experience is a result of their individually negotiated contracts with the franchise, not due to the name of the city on their uniforms.

Courts might also be reluctant to undertake the supervision required to enforce these contracts. However, the complexity of a lease pales in comparison to the countless intricately detailed contracts that have been enforced in the past. The primary supervisory difficulties would concern the ability of the court to force the teams to play the games in a particular city. As such, the bulk of the required supervision could be accomplished by tuning into a local sports broadcast.<sup>162</sup> Ironically, what might truly keep the courts from granting specific performance is the fact that they are reluctant to become fans of the game. Furthermore, the considerable damage to the city if performance is not guaranteed should weigh heavily into the courts' consideration and make them more amenable to conducting the necessary supervision.

In the months preceding the publication of this Comment, the sports world waited anxiously to see if a federal judge in Seattle, Washington, would grant specific performance despite the traditional objections discussed above. The viability of this remedy was squarely before the court,<sup>163</sup> and an earlier court decision had prevented the team from retreating behind the protective cover of arbitration.<sup>164</sup>

---

the Jets abide by its contract with the City and only conduct home football games at Shea Stadium).

161. See News Release, Seattle Sonics & Storm, Statement of Chairman Clayton I. Bennett (Nov. 2, 2007) (on file with the North Carolina Law Review) (indicating relocation was prompted, in part, by the denial of public funds, and the lack of sufficient private funds, to construct a new arena).

162. The lease contract, of course, may contain provisions dealing with revenue sharing and game-day responsibilities that would be more difficult to supervise, but these provisions are usually not the source of the litigation.

163. See *supra* note 8.

164. Order Denying Defendant's Motion to Stay and Granting Plaintiff's Cross-Motion for Stay of Arbitration, *City of Seattle v. Prof'l Basketball Club, LLC*, No. C07-1620RSM (W.D. Wash. Oct. 29, 2007).



Intent on going to trial, the City had already rejected a \$26 million settlement offer.<sup>165</sup> A six-day trial commenced, because the City was convinced it was “in as good a position as a city can be to hold a sports tenant to a lease.”<sup>166</sup> Fans across the nation shifted to the edge of their bleacher seats, expecting a pronouncement from the bench that would clarify the power of the city to enforce a lease contract.

Instead, the parties settled the case out of court, leaving settlement of the legal issue for another team and another city. After the trial, and apparently because he “thought there was a chance that he would be forced to stay in Seattle,”<sup>167</sup> Clay Bennett, the owner of the SuperSonics, increased his settlement offer to \$45 million. The difference between the final settlement amount and the initial offer lends credence to the assertion that precise economic valuation of the worth of franchise presence is an extremely difficult undertaking. Although Bennett retained the rights to the team name, history, memorabilia, colors, and intellectual property, he agreed to relinquish those rights should a new franchise arise in Seattle.<sup>168</sup> This settlement provision underscores the importance of social identify benefits and the sentimental attachment that the city felt to its franchise. An additional \$30 million was promised if Seattle is unable to secure a new NBA franchise despite stadium renovation. The inclusion of this conditional increase indicates that the parties clearly considered the possibility that comparable goods would be unavailable on the market.

If uncertainty as to the outcome of litigation is a common reason for parties to settle out of court, the resolution of the Seattle case should come as no surprise. Despite the traditional reluctance of courts to award specific performance, a number of arguments can be formed which counsel for an award of specific performance in contractual disputes arising out of sports franchise lease agreements. As this Comment has demonstrated, in certain instances the damage remedy does not accomplish contract law’s goal of placing the promisee in a similar position as if the promise had been performed. The unique nature of sports franchise lease contracts makes them similar to those areas of law in which specific performance has

---

165. Lester Munson, *Q&A On the Sonics Move to Oklahoma City*, ESPN, July 3, 2008, <http://sports.espn.go.com/nba/news/story?page=080702munsononsonicsmoveQA> (last visited Dec. 12, 2008).

166. Jim Brunner, *Can Lease Keep Sonics Here?*, SEATTLE TIMES, Aug. 27, 2007, at B1, available at [http://seattletimes.nwsource.com/html/localnews/2003855006\\_sonicslease27m.html](http://seattletimes.nwsource.com/html/localnews/2003855006_sonicslease27m.html) (quoting Tom Carr, the lead attorney in the case for the City of Seattle).

167. Munson, *supra* note 165.

168. Settlement Agreement Memorandum, *supra* note 133.

developed favor in our court system. First, the ill-defined and hotly contested economic benefits conferred through these contracts demonstrate the near impossibility of accurate valuation. In order to provide just compensation to the city, courts would be faced with the difficult, if not impossible, task of assessing the monetary benefit of franchise presence. More importantly, courts also allow specific performance when money alone could not make the injured party whole. The nature of sport in American society suggests that the damage remedy could not redress the injury, due to the sentimental attachment developed to a city's team and the unique provision of social identity that spectatorship offers. Even were these allegiances transferable, ultimately, the structure of the sports market would preclude the provision of a replacement. Thus, in a reverse of the traditional athletic roles, until judges step to the plate and come to bat for the cities of America, it will continue to be the ones sitting on the bench who ultimately determine what happens on the field of play.

WILL HENDRICK